(2)

No. 90-1075

In The

Supreme Court of the United States

October Term, 1990

JOE E. WALKER, JR., D/B/A
THE LAST CHANCE LOUNGE,

Petitioner,

vs.

CITY OF KANSAS CITY, MISSOURI; RICHARD L. BERKLEY, MAYOR OF KANSAS CITY, MISSOURI; THE CITY COUNCIL OF KANSAS CITY, MISSOURI; CHUCK WEBER; SALLY JOHNSON; FRANK PALERMO; ROBERT M. HERNANDEZ; JOANNE M. COLLINS; CHARLES A. HAZLEY; DAN COFRAN; KATHERYN SHIELDS; EMANUEL CLEAVER; MARK BRYANT; AND JOHN A. SHARP,

Respondents.

Petition For Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals' reversal of the district court's judgment warrants review by this Court.

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BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

October 30, 1987 Petitioner filed his complaint for the Declaratory Relief, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction in the United States District Court for the Western District of Missouri, Western Division. Petitioners pertinent sworn factual allegations were: "12. The Last Chance Lounge is a tavern

located at 13200 East 350 Highway, in southeast Kansas City, Missouri. 15. Plaintiff wishes to introduce in his establishment a form of entertainment commonly known as "go-go dancing" and 16. In order to achieve his purpose, Kansas City Zoning Ordinance Section 39.156(II) GOKC requires the Plaintiff's property to be classified as a C-X Zoning District before Plaintiff may offer such entertainment . . . " Petitioner was seeking the approval of a CX overlay zone as a prerequisite to the amendment of his liquor license to permit a form of entertainment not previously permitted under said liquor license. Petitioner successfully complied with all preliminary requirements pertaining to consideration of said Zoning Ordinance except that Petitioner offered no evidence for the consideration of the City Plan Commission, the Plans and Zoning Committee of the City Council, in his deposition or in his testimony in the trial court as to the specific type of entertainment he proposed in his tavern. Petitioner presented his matter to the District Court as a "license case" not a zoning case. The District Court determined that the requirements imposed upon the Petitioner to obtain CX Zoning prior to the amendment of his liquor license was essentially a requirement of obtaining a license for the purpose of engaging in this form of expression, hence a prior restraint. *Walker vs. Kansas City*, 691 F.Supp. 1243, 1250 (WD Mo. 1988) (Walker I).

Under Missouri law, licenses are personal and do not run with the real property. While the trial court decided the initial claim on the basis of a license, it erroneously treated the aspects of its order as a zoning matter in holding that "the court disagrees, however, with the City Attorney's interpretation that the injunction may only

last as long as Mr. Walker maintains his leasehold property interest.", *Walker vs. Kansas City*, 697 F.Supp. 1088, 1090 (WD Mo. 1988) (Walker II).

The Eighth Circuit Court of Appeals decision reversed the judgement for the petitioner and upheld the validity of the ordinance, *Walker vs. Kansas City*, 911 F.2d 80 (8th Cir. 1990 Reh. den. 1990) (Walker III).

REASONS FOR DENYING THE WRIT

This Court should deny the petition in this case for two reasons. First there is nothing in the facts of this case or the proceedings below that establishes a legitimate right of entitlement to the rezoning or the legal relief sought by Petitioner utilizing 42 U.S.C. 1983.

Second, the Eighth Circuit correctly applied the law in reversing the District Courts holdings. The Court correctly applied this Court's standards as enunciated in the *Singleton vs. Wulff*, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976).

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS TO REVERSE THE DISTRICT COURT BASED UPON AN ISSUE NEVER BRIEFED BY THE PARTIES OR CONSIDERED BY THE COURT BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE EIGHTH CIRCUIT OR THIS COURT.

Respondent City and respondents elected officials did nothing to deprive Petitioner of any property right. At trial, Petitioner testified: "question – So you are not

claiming today . . . that you had a right to this zoning? Answer – I never claimed a right to anything" (TR68). From these comments it's quite clear that Petitioner had nothing more than a unilateral desire to change his existing tavern business. Petitioner must have more than a unilateral expectation. *Board of Regents of State Colleges vs. Roth*, 408 U.S. 564, 576-77 (1972).

The Court correctly applied this Court's standards as enunciated in the *Singleton vs. Wulff*, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976) as followed by the Eighth Circuit in *Frank vs. Brookhart*, 877 F.2d 671, 676 (8th Cir. 1988 Reh. den. 1989).

II. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT CONSTRUE A LAND USE ORDINANCE AS A LIQUOR CONTROL ORDINANCE AND HENCE THE DECISION DOES NOT CONFLICT WITH APPROACHES TAKEN BY OTHER CIRCUIT COURTS OF APPEALS IN CASES INVOLVING THE SERVING OF LIQUOR IN ADULT ENTERTAINMENT ESTABLISHMENTS.

The Eighth Circuit Court of Appeals decision takes cognizance of the entire record made by Petitioner before the City hearings and the trial court. The Eighth Circuit reliance upon the authority of the twenty first amendment, *California vs. LaRue*, 409 U.S. 109 (1972) and *New York Liquor Authority vs. Bellanca*, 452 U.S. 714 (1981) is firmly grounded upon facts contained in the record before the City Plan Commission, the Plans and Zoning Committee of the City Council, and in the trial court. Petitioner did not attack the ordinance in question, 39.156 GOKC, on its face, but only its application to his licensed liquor business.

III. THE PRONOUNCEMENTS OF THE EIGHTH CIRCUIT COURT OF APPEALS REGARDING THE PROTECTION OFFERED TO SEMI-NUDE DANCING UNDER THE FIRST AMENDMENT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS OF APPEAL.

Petitioner's third point is frivolous, and specious. The Eighth Circuit Court of Appeals held: "although we do not decide the question as to whether the founding fathers had 'exotic dancing' in mind when they pinned the first amendment, our decision need not rest on a holding that go-go dancing is not protected speech . . . ". Petitioner has misconstrued the Court's holding. For this reason and the other reasons heretofore discussed, Petitioner's Petition should be denied. *Walker III id.* at 90.

IV. THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT FIND SEMI-NUDE DANCING TO BE OBSCENE.

The Eighth Circuit Court of Appeals was not citing *Miller vs. California*, 413 U.S. 15 (1973) for the proposition that the activity to be conducted in Petitioner's liquor establishment was obscene, but rather in an effort to attempt to understand the machinations of the Seventh Circuit Court of Appeal in their case of *Miller vs. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), recently argued and pending decisions by this Court at this time. Perhaps that decision will be dispositive of this matter.

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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